

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EUGENIO MENDOZA,  
  
Petitioner,  
  
v.  
  
CDCR,  
  
Respondent.

No. 1:20-cv-00979-SKO (HC)

**ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT JUDGE**

**FINDINGS AND RECOMMENDATION  
TO SUMMARILY DISMISS  
UNEXHAUSTED PETITION**

**[TWENTY-ONE DAY OBJECTION  
DEADLINE]**

Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is in custody at the Kings County Jail pursuant to a 2020 conviction in Kings County Superior Court for making terrorist threats. Petitioner filed the instant petition on July 15, 2020, challenging his current confinement. Because the petition is unexhausted and fails to name a proper respondent, the Court will recommend that it be DISMISSED.

**DISCUSSION**

**A. Preliminary Review of Petition**

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

1 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
 2 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to  
 3 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.  
 4 2001).

5 B. Exhaustion

6 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
 7 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
 8 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
 9 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
 10 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

11 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
 12 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
 13 Duncan v. Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court  
 14 was given a full and fair opportunity to hear a claim if the petitioner has presented the highest  
 15 state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney  
 16 v. Tamayo-Reyes, 504 U.S. 1 (1992) (factual basis).

17 Additionally, the petitioner must have specifically told the state court that he was raising a  
 18 federal constitutional claim. Duncan, 513 U.S. at 365-66. In Duncan, the United States Supreme  
 19 Court reiterated the rule as follows:

20 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state  
 21 remedies requires that petitioners "fairly presen[t]" federal claims to the state courts  
 22 in order to give the State the "opportunity to pass upon and correct alleged violations  
 23 of the prisoners' federal rights" (some internal quotation marks omitted). If state  
 24 courts are to be given the opportunity to correct alleged violations of prisoners'  
 25 federal rights, they must surely be alerted to the fact that the prisoners are asserting  
 claims under the United States Constitution. If a habeas petitioner wishes to claim  
 that an evidentiary ruling at a state court trial denied him the due process of law  
 guaranteed by the Fourteenth Amendment, he must say so, not only in federal court,  
 but in state court.

26 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

27 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his  
 28 federal claims in state court *unless he specifically indicated to that court that those*  
*claims were based on federal law.* See Shumway v. Payne, 223 F.3d 982, 987-88

(9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of federal courts, even if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . . .

In Johnson, we explained that the petitioner must alert the state court to the fact that the relevant claim is a federal one without regard to how similar the state and federal standards for reviewing the claim may be or how obvious the violation of federal law is.

Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), *as amended by Lyons v. Crawford*, 247 F.3d 904, 904-5 (9th Cir. 2001).

Petitioner states he was sentenced to a four-year prison term, and he has been designated to serve out his sentence at the Kings County Jail. He states he is entitled to earn 33% time credits against his sentence, but is being denied the credits while housed at Kings County Jail. It is clear from the petition that Petitioner has not exhausted his claims insofar as Petitioner has not presented his claims in any state court, including the California Supreme Court. Because the petition is unexhausted, the Court must recommend its dismissal. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001); Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

#### C. Respondent

In this case, Petitioner names CDCR as Respondent. A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Generally, the person having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); *see also Stanley*, 21 F.3d at 360. However, the chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or parole officer and the official in charge of the

1 parole or probation agency or state correctional agency. Id.

2 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition  
3 for lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326,  
4 1326 (9th Cir. 1970); see also Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd  
5 Cir. 1976). The Court would normally provide Petitioner the opportunity to cure this defect by  
6 amending the petition to name a proper respondent, but because the petition is completely  
7 unexhausted, amendment would be futile.

### 8 **ORDER**

9 IT IS HEREBY ORDERED that the Clerk of Court is DIRECTED to assign a District  
10 Judge to the case.

### 11 **RECOMMENDATION**

12 For the foregoing reasons, the Court HEREBY RECOMMENDS that the habeas corpus  
13 petition be DISMISSED WITHOUT PREJUDICE for failure to exhaust and failure to name a  
14 proper respondent.

15 This Findings and Recommendation is submitted to the United States District Court Judge  
16 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304  
17 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
18 Within twenty-one (21) days after being served with a copy, Petitioner may file written objections  
19 with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
20 and Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28  
21 U.S.C. § 636 (b)(1)(C). Failure to file objections within the specified time may waive the right to  
22 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

23  
24 IT IS SO ORDERED.

25 Dated: July 16, 2020

/s/ Sheila K. Oberto  
26 UNITED STATES MAGISTRATE JUDGE  
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